Supreme Court of the United States

OCTOBER TERM, 1904

No. 419

THE TERRITORY OF NEW MEXICO, *EX REL.*, CALEDONIAN COAL COMPANY, APPELLANT,

vs.

IRA A. ABBOTT (SUCCESSOR TO BENJAMIN S. BAKER), ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO AND JUDGE OF THE SECOND JUDICIAL DISTRICT COURT THEREOF, AND SAID SECOND JUDICIAL DISTRICT COURT, APPELLEES.

PETITION FOR REHEARING.

Appellant in the above entitled cause moves the court to grant a rehearing therein for the following reasons:

I.

Because this court has evidently assumed, for the purpose of this adjudication, that a Territorial district court, when exercising jurisdiction in cases arising under the Constitution and

laws of the United States, is a court of limited, and not of general jurisdiction.

II.

Because the court apparently assumes that the right of the Santa Fe Pacific Railroad Company to immunity from suits in the Federal courts outside of the district in which it is an inhabitant, without its consent, applies to it when sued in a Territorial court.

III.

Because the court apparently assumes, for the purposes of this decision, that the Santa Fe Pacific Railroad Company was, at the time of the service of process on its president, "doing business" other than in connection with its lands in New Mexico, when the contrary affirmatively appears by the record.

IV.

Because the court appears to have adopted as the basis of its decision the statement in the affidavit of President Ripley as follows: "that the company had no property in the Territory of New Mexico, except *lands acquired by it under a foreclosure of a mortgage* of the Atlantic and Pacific Railroad Company," and which lands were undisposed of, when it affirmatively appears from the record that the Santa Fe Pacific Railroad Company was incorporated for the purpose, among other things, of becoming the owner of those lands, and, at the time of the service of process, had no other business or reason for existence, except the ownership and management of those lands.

V.

The court appears to have determined this

case upon the theory that the question for consideration was whether or not President Ripley was attended by the corporation when he came into New Mexico, while the real question is, whether or not the Santa Fe Pacific Railroad Company has not, at all times, been subject to the jurisdiction of the court in which this action was brought, whenever it could be effectively notified of the pendency of a suit.

VI.

Because the court appears to hold that it was incumbent on appellant to show the existence of some local statute authorizing service of process in the manner in which service was made in this instance, while appellant insists that Territorial district courts may exercise the jurisdiction conferred on them by Congress, when sitting for the trial of causes arising under the Constitution and laws of the United States, in the absence of any Territorial legislation, although it is conceded that if there be Territorial legislation regulating the manner of the exercise of its jurisdiction, such regulation must be pursued.

VII.

Because the decision in this case appears to be in conflict with previous decisions of this court not called to the attention of the court by counsel, and to be, to some extent, due to a misapprehension by the court of the position of counsel for appellant.

NEILL B. FIELD,
Counsel for Appellant.

May it please the court. I should not, ordinarily, feel at liberty to ask this court to re-ex-

amine its unanimous conclusion, but, with much hesitation, and a sincere conviction that my duty to my client requires it, I venture to suggest that a re-examination of this record will convince the court that due weight has not been given to the controlling feature of this case.

The Santa Fe Pacific Railroad Company, at the time of the institution of this suit, had ceased to be a railroad company in anything but name. By the authority of Congress, it had sold and disposed of its railway property and franchises to the Atchison, Topeka and Santa Fe Railway Company, and the only reason for its further existence was the ownership and management of lands which, as far as is shown by this record, are wholly within the second judicial district of the Territory of New Mexico. The purposes for which it now exists are identically those for which the United States Freehold Land and Emigration Company was created a corporation by Congress by an act approved July 8th, 1870. (*16 Stat. L. 192.*) The Santa Fe Pacific Railroad Company did not acquire these lands under a foreclosure of a mortgage, in the sense that the acquisition of such lands was a mere incident of its corporate business, but, on the contrary, such acquisition and ownership was one of the reasons for its creation, and the only reason for its continued existence. It could not have acquired title to these lands without the express authority of Congress. By an act approved March 3d, 1887, entitled "An act to restrict the ownership of real estate in the Territories," etc., (*24 Stat. L. 476*), it is provided:

"Sec. 2. That no corporation or association more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall hereafter acquire or hold or own any real estate hereafter acquired in any of the Territories of the United States or of the District of Columbia.

"Sec. 3. That no corporation other than those organized for the construction or operation of railways, canals, or turnpikes shall acquire, hold or own more than five thousand acres of land in any of the Territories of the United States;

"And no railroad, canal, or turnpike corporation shall hereafter acquire, hold or own lands in any Territory, other than as may be necessary for the proper operation of its railroad, canal, or turnpike, except such lands as may have been granted to it by act of Congress.

"But the prohibition of this section shall not affect the title to any lands now lawfully held by any such corporation.

"Sec. 4. That all property acquired, held or owned in violation of the provisions of this act shall be forfeited to the United States, and it shall be the duty of the Attorney-General to enforce every such forfeiture by bill in equity or other process.

"And in any suit or proceeding that may be commenced to enforce the provisions of this act, it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights either of the United States or of the parties concerned in any such proceeding arising out of the matters in this act mentioned."

The reason for the rule which holds that corporations of one jurisdiction, buying lands in another jurisdiction, in foreclosure proceedings for the protection of their claims against debtors, do not thereby "do business" in such jurisdiction, has no application to the Santa Fe Pacific Railroad Company, and, while the justice and propriety of the rule is conceded, it is insisted that it is a perversion of the rule to apply it in this case.

Santa Clara Academy vs. Sullivan, 116 Ill. 375.

Penn. Life Co. vs. Bauerle, 143 Ill. 462.

Congress, in the exercise of its Constitutional power to create Federal agencies, created the Santa Fe Pacific Railroad Company, and authorized that company to acquire the railroad property and franchises of the Atlantic and Pacific Railroad Company, which, under foreclosure proceedings, had been sold to a committee of the bondholders of the latter corporation.

The Santa Fe Pacific Railroad Company was also authorized to acquire what remained of the lands which had been granted to the Atlantic and Pacific Railroad Company to aid in the construction of its railroad, but I apprehend that this latter authority finds its warrant in the power of Congress to legislate concerning the territory and property of the United States, rather than elsewhere in the Constitution. I doubt if it would be seriously contended that Congress has the power to create a land company, such as the United States Freehold Land and Emigration Company, to acquire lands and operate in one of the States of this Union; and

yet, the Santa Fe Pacific Railroad Company has not, since it disposed of its railroad property and franchises under the authority of Congress, differed in any essential particular from that corporation.

It is not to be denied that Congress, in the exercise of its power to legislate for the Territories, could create a land corporation such as is now under discussion, and could authorize it to hold title to lands in New Mexico, and could provide that it should not be subject to the jurisdiction of the courts of New Mexico; but it is not to be believed that Congress has intentionally done any such thing, or that this court will hold that any such condition exists, unless it is driven to do so by the imperative requirements of the law.

So long as the Santa Fe Pacific Railroad Company continued to be a Federal agency, there is little reason to doubt that it could carry on its business wherever the laws of Congress are in force, and without the consent of any other authority. Whether as a mere land company it could "do business" outside the Territories without the consent of the several States, is, to say the least, questionable. While the power of Congress to create a mere trading corporation in the Territories is clear, its want of power to authorize such a corporation to do business in one of the States of the Union, without the consent of that State, is, as it seems to me, equally clear. As I conceive it, the Santa Fe Pacific Railroad Company, at the time of its incorporation, had a dual capacity,—one quasi public in nature, in which it constituted a Federal agency, and the other purely private

and speculative. Congress granted lands to the Atlantic and Pacific Railroad Company to aid in the construction of its railroad, but when the Santa Fe Pacific Railroad Company came into being, the railroad had been constructed, and there was no longer any necessary connection between the grant of lands and the railway franchise. Congress might, if it had seen fit to do so, have created a separate corporation to take and hold these lands, but such a corporation, when created, would have been purely local in character; would have been, in no sense, a Federal agency; and subject to be excluded from doing business in any State, without the consent of that State. By the act authorizing the Santa Fe Pacific Railroad Company to sell its railroad property and franchises, it has, virtually, done this, because it has made the purchasing company a national corporation to the extent of the franchises purchased, and has divested the Santa Fe Pacific Railroad Company of its national character.

> "On the 25th of April, 1864, an act had been passed by the Legislature of New York, Laws of New York, 1864, ch. 385, p. 884, entitled 'An Act to consolidate the Boston, Hartford and Erie, the Boston, Hartford and Erie Extension, and the Boston, Hartford and Erie Ferry Extension Railroad Companies.' It provided as follows: 'The Boston, Hartford and Erie Extension Railroad Company, and the Boston, Hartford and Erie Ferry Extension Railroad Company, may both, or either, sell and convey to the Boston, Hartford and Erie Railroad Company the franchise and property of said several corporations,

upon such terms as may be mutually agreed upon.' * * * * *

"This act professes, in its title, to be an act to consolidate the three companies. It authorizes the sale to the Boston, Hartford and Erie Company of the franchises and property of the other two corporations, (which were New York corporations,) and provides that such sale shall pass the title to such franchises and property, and that the purchasing company shall thereby 'become possessed of the rights of charter and property sold,' and thereafter have, hold and use the same in its 'own name and right.'

"As a purchaser of what this act authorized to be sold to it, the company purchasing became a New York corporation, by its then existing name." * *

Graham v. Boston etc. R. R. Co., 118 U. S. 166-167.

"The Hartford, Providence & Fishkill Railroad Company was, without question, so far as it owned and operated a railroad within the State of Rhode Island, a corporation in and of that State; and the Boston Hartford and Erie Railroad Company became its legal successor in that State, as owner of its property, and exercising its franchises therein, and became, therefore, in respect to its railroad in Rhode Island, a corporation in and of that state."

Clark v. Barnard, 108 U. S. 449.

The grant of lands to the Atlantic and Pacific Railroad Company by Congress, and the authority granted to the Santa Fe Pacific Railroad Company, to take title to what remained of those lands, stand upon entirely different bases. The first was to enable the grantee to obtain

money wherewith to equip itself to perform its public functions; the latter was to enable the bondholders who had furnished the money for the construction of the Atlantic and Pacific Railroad line to manage and dispose of these lands, which were part of their security, to the best advantage.

The right, formerly possessed by the Santa Fe Pacific Railroad Company, to transact business throughout the Union, passed, with its other franchises, to the purchasing company; but its lands, and its liabilities, whether in tort, or by contract, remain to it, and the sole purpose of its further existence must be to apply its assets to the satisfaction of its liabilities. It cannot again enter the railroad business, for it is without a railroad franchise; and, at most, it can only do those things which are necessarily incident to the ownership of the lands referred to.

The purchasing company, by virtue of the purchase under authority of Congress, is subject to the jurisdiction of the court in the action in question.

That there may be reason and justice in the rule which says that the president of the purchasing company does not represent the company in those jurisdictions where he is merely a traveler, or sojourner, but where it does no business and owns no property, is conceded, although it is insisted that the rule must have its foundation in other considerations than those which apply to the president of a corporation created by a State, when attempted to be served with process within the jurisdiction of another State. Whether or not the president of a corporation which is a Federal agency, rep-

resents the corporation at any given place, can not be affected by State lines; for the exercise of Federal authority, under the Constitution, is not, in any manner, circumscribed by State lines. Just as the general government is present everywhere within the territorial limits of the United States, (*Harlan, J. in U. S. v. Southern Pacific Railroad Company, et al., 49 Fed. 301*), so a general or special law of the United States, even one in the form of a corporate charter, is present everywhere in the United States, except in cases wherein the force and effect of such law may be restricted by its express or implied terms. The grant, by Congress, of a franchise to a corporation, for the purpose of performing a public function, is in the interest of the public, not of the corporation, and should not, as I freely concede, be extended by implication to the embarrassment of the corporation in the performance of its public duties. It is probably necessary, to effectuate the purpose of Congress, that the rule should be established that such corporations are not to be embarrassed by suits, and are not to be subject to the jurisdiction of courts, in remote localities where neither the plaintiff nor the defendant resides, and where the cause of action did not accrue, and that such a limitation upon the grant of such a franchise might be fairly implied, for the reason stated; but I respectfully submit that no further limitation should be created by implication.

The long struggle in this court, which finally resulted in its existing doctrine as to the citizenship of corporations, was founded upon a divergence of views as to the principles which

should determine that citizenship, and resulted in the adoption, by the court, of a more or less arbitrary presumption that the incorporators of every corporation, created by a State, are citizens of the State of its creation. This presumption, as is well known, is contrary to the fact in many, if not a majority, of the instances in which it is invoked; but it was forced by necessity, and its wisdom is unquestionable. This presumption could, however, have no application to a corporation created by Congress, either as a Federal agency, or by virtue of its power to legislate for the Territories, for a variety of reasons, the most important of which is, that a national corporation could not invoke the jurisdiction of the Federal courts upon the ground of diversity of citizenship, because such diversity, to create the jurisdiction, must be between citizens of different States. This court has, more than once, held that the word state, as used in the clause of the Constitution to which reference is made, is there used in its narrowest sense, and embraces only the members of the American Union of States.

New Orleans v. Winter, 1 Wheat. 92.
Barney v. Baltimore, 6 Wall. 280.
Cameron v. Hodges, 127 U. S. 322.
Hooe v. Jamieson, 166 U. S. 395.

Another potent reason why the rule cannot be applied is that it is founded upon the proposition that the president of a State corporation is beyond the jurisdiction of the sovereign which created the corporation, when he goes beyond the limits of that State, for it is only when the president of a corporation departs from the

territory of its sovereign, that it can be said that he loses his official character. The corporation itself, "cannot migrate, nor change its residence, without the consent, express or implied, of its State," (*R. R. Co. v. Koontz*, 104 *U. S.* 12.) The president, in his individual capacity, may, of course, come and go as the exigencies of his business require, but in his travels, the corporation does not attend him,—he is the incident, the corporation is the principal. It is only because the corporation is fixed in the territory of its sovereign, and cannot depart, that the president, when in foreign parts, is held to be a private person, and if he be specifically authorized to represent the corporation abroad, he does it, not as president, but in the character of an agent specially constituted.

The consent of a corporation, created by one State, to be sued in another State, is implied from the doing of business outsid ethe State of its creation; but no resort to the doctrine of corporate consent, waiver or estoppel, is needed where the defendant corporation was created for the purpose of acquiring and holding lands in the district in which it is sued,—lands which it could not acquire or hold without the express authority of Congress, and in which it is summoned through its head officer. It seems that the use of the words "domestic" and "foreign," in connection with my attempt to characterize the Santa Fe Pacific Railroad Company in my brief, has led to some confusion, and to a misapprehension, on the part of the court, of my position. That I did not, by these expressions, convey to the mind of the court the idea intended, is apparent from the opinion.

The Santa Fe Pacific Railroad Company, when operating under its railroad franchise, was always more "at home" in New Mexico, then in New York, Chicago, or Topeka; but since it has been divested of its national character, it has no function to perform authorizing or requiring its presence elsewhere. The chief point of difference between a natural and artificial person is that the former may do whatever is not forbidden by law, and the latter can only do what is authorized by its charter. (*R. R. Co. v. Harris*, 12 *Wall.* 81.)

It was evidently the theory of Congress, when it authorized the incorporation of the Santa Fe Pacific Railroad Company, that the corporation to be created was to be a local corporation, for some purposes at least, and was to be subjected to the control of the State, when the Territory of New Mexico should be admitted into the Union. (*29 Stat. L. 624*).

Speaking for the court, Mr. Justice Harlan says that "the Santa Fe Pacific Railroad Company, when sued in the Territorial district court, was not an inhabitant of the district within the meaning of the local statute. It had no principal or other office in the Territory, nor did it have an officer who could, in a legal sense, be found there, nor did it, in any just sense, carry on business in the Territory. The company still owned lands there, and that fact was not sufficient, by itself, to bring the case within the provisions of the Territorial statute."

But I did not, and do not contend, that the local statute referred to extended to corporations such as the Santa Fe Pacific Railroad Company. The statute was quoted for the purpose of call-

ing sharply to the attention of the court the fact that provision by local law was made for the service of process upon corporations created by, or under the laws of the Territory, and there was no provision, by local law, for the service of process upon such a corporation as the Santa Fe Pacific Railroad Company. I do not believe a corporation created by authority of the Territory of New Mexico could evade the jurisdiction of its courts by failing to keep an office, or to do business, within the Territory, nor do I think this court would hold that such a corporation, if so situated, would not be well served with process, by delivery of the same to its president, anywhere within the limits of the Territory, and entirely without regard to the nature of the business which might have brought such president into the Territory. The contention was that the service upon Mr. Ripley would have been good service under the local law, if his corporation had been created by that law; but the further contention was made, and to that contention I invite the careful consideration of the court, that the service was good on common law principles. The Territorial district court was, by the Organic Act, invested with common law jurisdiction. It is inconceivable that the Territorial legislature could defeat the exercise of that jurisdiction, in cases arising under the Constitution and laws of the United States, by failing to provide a method for the service of process in such cases. It is true that this court has held that the jurisdiction, thus conferred, is not regulated by the judiciary acts of Congress, (*Clinton v. Englebrecht, 13 Wall. 434*), but this court has never

intimated, prior to the decision in this case, that the exercise of that jurisdiction was dependent upon local legislation. I insist that those courts can enforce rights, and administer remedies, arising under the Constitution and laws of the United States, in the absence of Territorial legislation, and may acquire jurisdiction, in common law cases, by any method which would have been sufficient to invest a common law court with jurisdiction of the person of the defendant in any case. A Territorial legislature could no more defeat the enforcement of the laws of Congress, either by action or inaction, than could the legislature of a State defeat the exercise of jurisdiction by the Constitutional Federal courts, in the same manner.

> "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. * * * * * * *
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> No trace is to be found in the constitution, of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplish-

ment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution."

Per Marshall, C. J., in McCulloch v. Maryland, 4 Wheat. 404, 424.

I concede that these courts are not courts of the United States, within the meaning of the Constitution; but I insist that, when sitting for the trial of causes arising under the Constitution and laws of the United States, they are no more subject to have their jurisdiction curtailed, by Territorial legislation, than are the Constitutional Federal courts subject to be defeated or circumscribed, in their jurisdiction, by State legislation. This court has said:

"the jurisdiction of the Territorial courts is collectively coextensive with and correspondent to that of the State courts—a very different jurisdiction from that exercised by the Circuit and District Courts of the United States. In fine, the Territorial, like the State courts, are invested with plenary municipal jurisdiction."

Hornbuckle v. Toombs, 18 Wall. 656.

"The district court has two distinct jurisdictions. As a Territorial court it administers the local law of the Territorial government; as invested by act of Congress with jurisdiction to administer the laws of the United States, it has all the authority

> of circuit and district courts; so that, in the former character, it may try a prisoner for murder committed in the Territory proper, under the local law, which requires the jury to determine whether the punishment shall be death or imprisonment for life, Laws of Dakota, 1833, ch. 9; and, in the other character, try another for a murder committed within the Indian reservation, under a law of the United States, which imposes, in case of conviction, the penalty of death."

Ex parte Crow Dog, 109 U. S. 560.

It is true that Congress has delegated to the Territorial legislature power to regulate the exercise of this jurisdiction; but the power to regulate does not embrace the power to destroy, and it is a familiar requirement that all Territorial legislation must be consistent with the legislation of Congress. Notwithstanding this court, in discussing this jurisdiction, in *Hornbuckle v. Toombs, supra*, said:—

> "It is true that the District Courts of the Territory are, by the organic act, invested with the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States; and a portion of each term is directed to be appropriated to the trial of causes arising under the said Constitution and laws. Whether, when acting in this capacity, the said courts are to be governed by any of the regulations affecting the Circuit and District Courts of the United States, is not now the question. A large class of cases within the jurisdiction of the latter courts would not, under this clause, come in the Territorial courts; namely, those in which the jurisdiction depends on the citizenship

> of the parties. Cases arising under the Constitution and laws of the United States would be composed mostly of revenue, admiralty, patent, and bankruptcy cases, prosecutions for crimes against the United States, and prosecutions and suits for infractions of the laws relating to civil rights under the fourteenth and fifteenth amendments. To avoid question and controversy as to the modes of proceeding in such cases, where not already settled by law, perhaps additional legislation would be desirable."

Congress has found it unnecessary to legislate further with reference to the exercise of this jurisdiction, but this court has, in numerous cases, announced principles from which the rule for which I contend is readily deducible.

Thiede v. Utah, 159 *U. S. 510.*
Reynolds v. U. S. 98 U. S. 145.
Miles v. U. S., 103 U. S. 304.
Good v. Martin, 95 U. S. 90.
Ferris v. Higley, 20 Wall. 375.

If the Territorial courts had jurisdiction of the subject matter of the original action, and I respectfully submit that this question is squarely presented by this record, and ought to be decided, to the end that my client may be spared the enormous expense of a litigation of that character, in a court whose jurisdiction is doubtful; and if that jurisdiction, as I think I have shown, may be exercised, in the absence of Territorial legislation, according to the principles of the common law, it must follow that the service of process upon Mr. Ripley, within the district, was sufficient to invest the court

with jurisdiction of the corporation. Without discussing the process of *distringas*, which, so far as my investigation enables me to speak, has never been used in the United States, the only method known to the common law, whereby a corporation could be affected with notice of the pendency of an action, was by *service* of process on the head or principal officer of the corporation *within the jurisdiction* of the sovereignty creating the corporation.

In the case of *Young v. Town of Dexter, etc., 18 Fed. 208*, Judge Dyer states the rule in the following language:

> "At common law, the process against a corporation could only be served on its head or principal officer within the jurisdiction of the sovereignty where the artificial body existed."

He cites in support of this rudimentary proposition *2 Bac. Abr. 12; Matter of McQueen v. Middletown Manuf'g Co., 16 Johns. 6; Bushel v. Ins. Co. 15 Serg. & R. 176.*

I am aware that this court, in the case of *Goldey v. The Morning News, 156 U. S. 520*, has distinctly declined to accept the doctrine of the courts of the State of New York, with relation to the power of the courts of one State to acquire jurisdiction over a corporation of another State, by service of process upon one of its officers temporarily present in the State seeking to acquire jurisdiction, but its dissent from the New York doctrine in that particular does not imply a refusal to accept the contention I make, for Chief Justice Fuller, speaking for the court in *Railroad Company v. Daughtry, 138 U. S. 305-6*, said:

> "At common law, service was made on such head officer of a corporation as secured knowledge of the process to the corporation." * *

and I am not aware that this court has ever declined to give its assent to the proposition as stated by Judge Dyer, unless it has done so in the present case. The opinion, in this case, seems to me to recognize the soundness of the principle, but to deny its application. In the opinion, it is said:

> "It is firmly established that a court of justice cannot acquire jurisdiction over the person of a defendant, except by actual service of notice upon him, within the jurisdiction, or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service."

This statement of the rule seems to be in entire harmony with that contended for, and is fully met, in all of its requirements, when the court issuing the process, the corporation, and its president are all within the jurisdiction of the sovereignty which created the corporation; but if there be a further limitation of the authority of the president to accept service in behalf of his corporation, such as I have hereinbefore indicated, I cannot believe that the limitation should be so extended as to render it impossible to obtain jurisdiction of the Santa Fe Pacific Railroad Company in the principal case, nor do I believe it to be justified, or required, by any expression to be found in any case heretofore decided by this court. In the principal case Congress created the right; provided the remedy; created the court, and invested it

with jurisdiction to administer the remedy; created the Santa Fe Pacific Railroad Company, and clothed it with authority to acquire and hold lands, which, without the authority of Congress it could not acquire or hold; and by its creature, the Territorial legislature, created the Caledonian Coal Company. Whatever may be said as to the necessity for, or the justice or reasonableness of the rule, which would deny the official character of the president of a national corporation, which is a Federal agency, when traveling in those parts of the United States in which the corporation owns no property and does no business, and of the right of such a corporation to immunity from suits in the Federal courts, elsewhere than in the district where is the seat of the corporation, there is no rule of convenience, or, as it seems to me, of justice, which requires this court to hold that Mr. Ripley was not a person "authorized to accept service" on behalf of the Santa Fe Pacific Railroad Company, at the time of the service of process upon him in the original case. Mr. Justice Rogers, of the Supreme Court of Pennsylvania, in 1827, anticipating by many years the doctrine of jurisdiction by implied consent, said:

> "It is difficult to conceive, that if corporations are artificial persons (if they can do all acts that natural persons may—if they can sue within a foreign jurisdiction), why they should not also be liable to suit, in the same manner, and under the same regulations as domestic corporations. The reason why they have not been, in point of fact, more frequently sued, is given by Chief Justice Spencer, in 16 Johns. 7. The process against a corporation, by the common law

must be served on its head or principal officer, within the jurisdiction of the sovereignty where this artificial body exists. If the president of a bank of another state were to come within this state, he would not represent the corporation here; his functions and his character would not accompany him, when he moved beyond the jurisdiction of the government under whose laws he derived his character. That this would be the case, when he was within the state on business unconnected with the corporation, there can be no question, but where a corporation locates the president, or other officers within the state, for the express purpose of making contracts here, whether process served on him, would not be sufficient, is a question which I shall not undertake to determine, because it does not necessarily arise. There is nothing, then, in the nature of a corporation to exempt it from suit; the difficulty arises from there being no person within the limits of the state on whom you can serve your process.

"With the multiplication of corporations, which has and is taking place to an almost indefinite extent, there has been a corresponding change in the law in relation to them. There was a time when it was supposed that no suit could be sustained against them, unless upon an express contract under the seal of the corporation; it is now held, that they are liable in trespass, and in case upon an implied contract. *7 Mass. 169; 7 Cranch 299; 4 Serg. & Rawle 16; 14 Johns. 118.* This change in the law has arisen from a change of circumstances, from that silent legislation by the people themselves, which is continually going on in a country such as ours, the more wholesome, because it is gradual, and wisely adapted to the peculiar situation, wants and habits of our citizens."

Bushel et al v. Com. Ins. Co., 15 Serg. & R. 176.

"A corporation, though legally considered a person, must perform its corporate duties through natural persons, and is impersonated in and represented by its principal officers, the president and directors, who are not merely its agents, but are, generally speaking, the representatives of the corporation in its dealings with others."

Louisville &c. Ry. Co. v. Louisville Trust Co. 174 U. S. 573.

"The object of all service of process, for the commencement of a suit, or any other legal proceeding, is to give notice to the party proceeded against, and any service which reasonably accomplishes that end, answers the requirements of natural justice and fundamental law."

Gibbs v. Queen Ins. Co., 63 N. Y. 114.

It so happens that, in the original case, the cause of action is transitory, and is in tort; but any rule, as to the sufficiency of the service of process, which is applicable to the principal case, would be equally applicable, if the action had been ejectment, and had involved the title to the whole, or any part, of the lands acquired and held by the Santa Fe Pacific Railroad Company, under the authority of Congress. It seems contrary to the principles of natural justice that the courts of the Territory of New Mexico must be forever open to the Santa Fe Pacific Railroad Company, for the protection of its rights, while it is not compellable to answer in those same courts, for wrongs committed within that Territory; that if it has a cause of action against the Caledonian Coal Company, it may

invoke the aid of the Territorial court for its enforcement, but if the Caledonian Coal Company has a cause of action against it, that company must go elsewhere for redress. Such a rule would deny a remedy to the people of New Mexico in all actions local in their nature.

It the case of the *Railroad Company v. Harris, 12 Wall. 65*, this court considered the sufficiency of the service of process issued by a court of the District of Columbia, and served upon the president of the Baltimore and Ohio Railroad Company, a Maryland corporation, within the District of Columbia, and while it is true, that, in that case, no question was made that the railroad company was "doing business" within the District of Columbia, it is also true that there was no statute of the District of Columbia authorizing suits against foreign corporations within the District, and that the Baltimore and Ohio Railroad Company was doing business within the District by the permission of Congress. Answering the proposition that, although the company was in the District of Columbia, doing business by authority of Congress, it was not suable there, Mr. Justice Swayne, speaking for this court, said:

> "Here the question is whether the company was suable in the District of Columbia. In the case reported in Grattan, it was said: 'It would be a startling proposition if in all such cases citizens of Virginia and others should be denied all remedy in her courts, for causes of action arising under contracts and acts entered into or done within her territory, and should be turned over to the courts and laws of a sister State to seek redress.' The same considerations apply to the case before us. When this suit was

> commenced, if the theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another State. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility. It is not to be supposed that congress intended that the important powers and privileges granted should be followed by such results."

I earnestly insist that the Congress of the United States has granted to the Santa Fe Pacific Railroad Company a franchise to hold lands within the Territory of New Mexico, which is of enormous value; a franchise which could not have been granted by the legislature of New Mexico, nor by the legislature of any State; a franchise which so identifies it with the people of New Mexico that great injustice must necessarily follow if it may not be sued in the Territorial courts, and that all that was said by this court in the Harris case, which I have quoted, is equally applicable here.

There is another aspect in which this decision merits the careful consideration of the court. The acts of Congress, under which the Caledonian Coal Company is seeking redress in the principal action, contain highly penal provisions, and subject the Santa Fe Pacific Railroad Company to indictment, and heavy fines, if it has committed the acts of which the Caledonian Coal Company complains. If it is under no obligation to submit itself to the jurisdiction of

the district court of the second judicial district of the Territory of New Mexico, in a civil action, by reason of the service of a summons issued out of that court, upon its president, while within that district, neither can it be required to answer an indictment, should one be found against it, for a violation of those statutes, by a grand jury, duly empaneled in that court, to inquire into offenses committed against the laws of the United States. If, by the sale of its railway franchises and property, by the permission of Congress, it is no longer liable to be sued in a civil action in the courts of the Territory, sitting for the trial of civil causes arising under the Constitution and laws of the United States, *without its consent*, neither is it liable to be punished criminally for the doing of acts to which Congress has attached the severest penalties. The only process available in either case, whether the proceeding be by complaint or declaration in a civil action, or by indictment or information in a criminal proceeding, is a summons, and the principle which this court declares to be applicable to all courts is equally applicable to all forms of procedure, whether civil or criminal. If President Ripley is not a person authorized to accept service in behalf of his corporation in the one case, neither is he in the other; and if jurisdiction cannot attach in the one case, neither can it attach in the other.

Has the Santa Pacific Railroad Company, by the permission of Congress, become a fugitive from justice? For an offense committed against the laws of the United States, within the Territory of New Mexico, it cannot be tried elsewhere, and the process of the Territorial courts

has never been supposed to run beyond the limits of the Territory. If a summons in a criminal case, arising in New Mexico, under the laws of the United States, can be served in New York, Illinois or Kansas, a like summons, in a civil case arising under the same laws could also be served there; but I submit that such service would be of no validity in either case.

Congress, by the act known as the Elkins act, has abolished imprisonment as a part of the punishment for violations of the interstate commerce law, and has provided for the indictment of corporations, but has provided no method of subjecting them to the jurisdiction of the courts, or of compelling them to answer such indictments. Notwithstanding this omission, I submit that the proper and only method of acquiring such jurisdiction is a summons substantially in the form, and with the same effect, as a summons in a civil action.

U. S. v. John Kelso Co. 86 Fed. 304.
Com. v. R. R. Co. 165 Pa. St. 162.
R. R. Co. v. State, 32 N. H. 215.
State v. R. R. Co., 89 N. C. 584.

I respectfully submit that the ends of justice will be subserved by a rehearing and reconsideration by the court of the questions involved in this case, and I respectfully ask that the same may be granted.

I hereby certify that this application is not made for delay, but because I believe it to be well founded.

Respectfully submitted,

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Counsel for Appellant.